quired naturalization which is a "scrap of paper" here, just as it is in their native countries.[27]

The reader will have remarked that all the lines of this brief discussion converge on a common point. Even if the arguments advanced above are mistaken and can be successfully rebutted, it appears that the United States has, since the commencement of the war in 1914, received or purported to receive as citizens numbers of foreign born individuals whose status is somewhat doubtful here and decidedly doubtful abroad. If we grant that the nations cobelligerent with us are likely in courtesy and good feeling to waive any rights concerning their nationals, our opponents still remain to be considered. Embarrassment amounting to a dilemma is clearly possible. It is hard to see how we can refuse to protect even in Germany a German native naturalized here between August 3, 1914, and the end of the war. Our own statute law requires the executive to tender such protection.[28] Yet if we do so, we shall be denying Germany a right which the United States has recognized and asserted for itself. To put the point in another way, no persons have exceeded Americans in denunciation of those provisions of the Delbrück Law which encourage the conscious creation of dual allegiance. Can we continue this denunciation with much justice if our courts and our Congress have been making decisions and passing laws which tend toward precisely the same end?[29] JOHN M. MAGUIRE.

THE THEORY OF THE PLEADINGS. — It might be thought that if a defendant has had ample notice of the claim against him and an opportunity to defend, and the facts have been fully presented on both sides, and a judgment has finally been recovered against him, he ought to pay. Even more clearly it would seem that when the defendant in his answer has expressly admitted a right of action in the plaintiff, the plaintiff should be entitled to recover on that right of action. In New York according to a recent decision of the Court of Appeals this is not the case. One Jackson brought suit against one Strong alleging that they had entered into a contract to prosecute an undertaking for their joint benefit, sharing equally as partners in the expenses and in the receipts; and the plaintiff asked for an accounting and for a recovery of the amount due. The defendant denied the agreement to share equally but alleged that he had agreed to employ the plaintiff as his assistant and to pay him the reasonable value of his services. The case was tried before a referee who reported that there was no agreement to share but that the defendant had agreed to pay the plaintiff the reasonable value of his services. Judgment was given for the plaintiff for the reasonable value of his services. After several years the Court of Appeals has at length decided that the judgment should be reversed.[1] And why? Not because the

[27] If this doubt turns out to be really substantial, the air should be cleared by a remedial act.

[28] U. S. REV. STAT., § 2000.

[29] The whole tangled situation should be straightened out by explicit provisions of the final treaty of peace. Otherwise we have stored up squabbles for the next fifty years.

[1] Jackson *v.* Strong, 222 N. Y. 149. See RECENT CASES, page 179.

plaintiff did not have a right to recover the amount awarded him in the judgment — the defendant in his answer had expressly admitted that the plaintiff had a right to recover such an amount — but because in his complaint he had proceeded on the theory of a partnership and his complaint was in the nature of a bill in equity, whereas the judgment was based upon a contract and was in the nature of a judgment at law. The language of the court might have appealed to a special pleader of the seventeenth century. The court says:

"The inherent and fundamental difference between actions at law and suits in equity cannot be ignored. As has often been said: 'Pleadings and a distinct issue are essential to every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint would serve no useful purpose.' And further: 'The rule that judgment should be rendered in conformity with the allegations and proofs of the parties, *secundum allegata et probata*, is fundamental in the administration of justice. Any substantial departure from this rule is sure to produce surprise, confusion, and injustice.'"

This is a striking example of the technical doctrines governing pleadings at common law,[2] and an illustration of the miscarriages of justice which the codes were intended to prevent.[3] The only real difficulty in the case would be that there was no trial by jury. But a perfect answer is that, owing to the defendant's admission that he had made a contract with the plaintiff and had broken it, there was no question on this point for the jury to try.[4]

There has been a similar difficulty in New York in abolishing the forms of action in actions at law. In an earlier New York case[5] the plaintiff alleged that the defendant had by fraud induced the plaintiff to enter into a contract with him, and that the defendant had broken the contract. The defendant denied the fraud but did not deny the making and breaking of the contract. The court refused to give judgment for the plaintiff on the contract because his complaint was based on the theory of fraud and not of contract.[6] In a somewhat similar case[7] there is a striking dissenting opinion by Peckham, J., who expressed himself in the following plain and convincing words:

"The merits of the cause have been fully tried, without surprise to either party. . . . The defendant understood the complaint; no pre-

---

[2] *Cf.* Marsh *v.* Bulteel, 5 B. & Ald. 507 (1822), in which the plaintiff who declared on one breach of contract was not allowed to recover on another which was expressly admitted by the defendant in his plea.

[3] See N. Y. CODE CIV. PROC., § 3339, abolishing the distinction between actions at law and suits in equity, and the forms of those actions and suits; and § 723, providing for the liberal allowance of amendments, and providing that in every stage of the action the court must disregard an error or defect in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party.

[4] See 31 HARV. L. REV. 669, 675–678.

[5] Barnes *v.* Quigley, 59 N. Y. 265 (1874). But see Connor *v.* Philo, 117 N. Y. App. Div. 349, 102 N. Y. S. 427 (1907).

[6] For another recent case committing New York to the reactionary view, see Walrath *v.* Hanover Fire Ins. Co., 216 N. Y. 220 (1915). Indiana clings to the same view. See City of Union City *v.* Murphy, 176 Ind. 597, 96 N. E. 584 (1911).

[7] Degraw *v.* Elmore, 50 N. Y. 1 (1872).

tense that he was misled by it. This variance, between the pleading and the proof, the court had full authority to amend or to disregard under the Code. This question of pleading has been a terror to suitors for many years before the Code. Legislatures have sought in vain to give relief, and now if this decision be sustained, I think our movement is backward much more than half a century. . . . Probably in not one case in ten thousand has injustice been done from the ignorance of a suitor as to the matters to be tried. But the cases of loss and damage to suitors by some defect of pleading have been innumerable."

The whole tendency in modern times is away from the technical view of the New York court; and the view of Peckham, J., is becoming more and more widely accepted.[8] It cannot be said that the modern view has actually resulted in the surprise or confusion so dreaded by the court in *Jackson* v. *Strong;* and certainly, as Peckham, J., observed, it is the technical view rather than the modern view which results in injustice. The New York decisions emphasize the necessity of bringing about those changes in procedural law which are now being so strongly urged by the practical and intelligent members of the bar of that state.

INCOME TAX ON NONRESIDENTS. — All taxation is based upon protection furnished by the sovereign levying the tax to person, property or business.[1] The income tax, like all other taxes, must be supported upon this principle, and it has therefore been held that income received by a nonresident from property situated beyond the state is not within the taxing power of the state.[2] So where a Wisconsin decedent left personal property to a nonresident trustee in trust for a nonresident, and the trustee removed the property from the state, it was held that income thereafter accruing was not taxable in Wisconsin.[3]

The right to tax the domiciled resident upon all his income, from whatever source, seems to be clear, since the sovereign is exercising thereby his jurisdiction over the person taxed. Most jurisdictions impose the tax upon all domiciled residents.[4] What effect the decision of the Supreme Court in *Union Refrigerator Transit Co.* v. *Kentucky*[5] may have upon the American acts is not altogether clear. The courts will probably allow the taxation of all income, even that derived from chattels situated elsewhere, at the state of the domicile, on the ground that the permission and protection of that state enables the owner to receive and enjoy the income; just as they allow the state of domicile of a decedent to tax the inheritance of chattels situated in other states.[6]

---

[8] See Knapp *v.* Walker, 73 Conn. 459, 47 Atl. 655 (1900); Bruheim *v.* Stratton, 145 Wis. 271, 129 N. W. 1092 (1911); Cockrell *v.* Henderson, 81 Kan. 335, 105 P. 443 (1909); 50 L. R. A. (N. S.) 1. See also 24 HARV. L. REV. 480.

[1] Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 26 Sup. Ct. Rep. 36 (1905).

[2] State *v.* Wisconsin Tax Commission, 161 Wis. 111, 152 N. W. 848 (1915).

[3] Bayfield County *v.* Pishon, 162 Wis. 466, 156 N. W. 463 (1916).

[4] British Tax Act of 1853, § 2, Sched. C. D.; U. S. Tax Act of October 3, 1917, § 1; Wisconsin Income Tax Act, § 1087 *m*, § 2.

[5] 199 U. S. 194, 26 Sup. Ct. Rep. 36 (1905).

[6] Bullen *v.* Wisconsin, 240 U. S. 625 (1916).